STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
THE HONORABLE PETER D. O'CONNELL PRESIDING

JOAN M. GLASS,

Plaintiff/Appellant

v

RICHARD A. GOECKEL
and KATHLEEN D. GOECKEL,

Defendants/Appellees

/

Supreme Court Dkt No.126409
Court of Appeals No. 242641
Alcona Circuit Ct. No. 01-10713-CK

PAMELA S. BURT (P47857)
Attorney for Plaintiff/Appellant
WEINER & BURT, P.C.
635 N. US 23, P.O. Box 186
Harrisville, MI 48740
(989) 724-7400

SCOTT C. STRATTARD (P33167)
Attorneys for Defendants/Appellees
BRAUN, KENDRICK, FINKBEINER
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

/

DEFENDANTS'/APPELLEES'
MOTION FOR REHEARING

NOW COMES Defendants/Appellees, Richard and Kathleen Goeckel, by and through their attorneys, BRAUN, KENDRICK, FINKBEINER, PLC, and respectfully request that this Honorable Court grant their Motion for Rehearing for the following reasons:

1. The Court's opinion fails to acknowledge the precedential statement from *Lorman* v *Benson*, 8 Mich 18, 30 (1860) that although "it was quite common to use the shore for various purposes of passage, that use was not regarded as rightful, but merely by sufferance, and analogous to the frequent passage over uninclosed lands, which was not lawful, but was seldom complained of."

2. The Court's opinion fails to acknowledge the precedential statement from *Hilt* v *Weber*, 252 Mich 198, 225; 233 NW 159 (1930) that "the riparian owner has exclusive use of the bank and shore."

3. The Court's opinion fails to acknowledge the precedential statement from *Peterman* v *DNR*, 446 Mich 177, 192; 521 NW2d 499 (1994), repeated from *Hilt*, that "the riparian owner has exclusive use of the bank and shore."

4. The Court's opinion fails to acknowledge that, in the words of dissenting Justice Weist, the *Hilt* decision "constitutes the Michigan shoreline of 1,624 miles private property, *and* thus *destroys* for all time *the trust* vested in the State f*or the use and benefit* of its citizens." *Hilt* at 231.

5. For its assertion that the Ordinary High Water Mark is the boundary of public rights on the Great Lakes, the Court's primary authorities, *Peterman* and *State* v *Trudeau*, 139 Wis 2d 91, 103; 408 NW2d 33 (1987) are cases where the issues were neither briefed nor contested by the parties.

6. The decision fails to acknowledge that for several decades, the State and its chief law enforcement—the Attorney General—have followed the "exclusive use" rule in carrying out their duties.

7. The Court has failed to acknowledge the post-*Hilt* case of *Kavanaugh* v *Baird*, 253 Mich 631; 235 NW 871 (1931), in which this Court reversed a finding that the public trust extended over the shore and instead limited trust rights to the low-water mark or water's edge, and quieted title in the shore in favor of the riparian as against the State.

8. The Court has improperly attributed to Defendants an "agreement" that the public trust includes the right to walk, when Defendants' brief specifically argued to the contrary.

9. The Court's opinion is erroneous in several other respects, only some of which are demonstrated in the accompanying brief.

10. The effect of the Court's decision, if followed, would be to radically change the use and character of Michigan's beaches over time.

11. The decision effects an unconstitutional taking of Defendants' riparian rights for public purposes, and violates due process.

WHEREFORE, Defendants Richard and Kathleen Goeckel respectfully request that this Honorable Court grant their Motion for Rehearing and hold that Defendants are entitled to exclusive use, as well as title, to the water's edge, free of public trust. Alternatively, Defendants request that this Honorable Court vacate its decision, and adopt the well-reasoned opinion of Justice Markman—which allows beach walking as it has traditionally occurred in this state, but reduces or eliminates myriad other problems presented by the majority's decision—as its own.

Dated: August 18, 2005

Respectfully submitted,

SCOTT G. STRATTARD (P33167)
Attorneys for Defendants/Appellees
BRAUN, KENDRICK, FINKBEINER
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Federal Cases: **Page #**

State Cases:

Statutes:

Other Authorities:

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction to entertain this Motion pursuant to MCR 7.313(D)(1).

STATEMENT OF QUESTIONS PRESENTED

I. HAS THIS COURT WRONGFULLY IGNORED ITS OWN PRECEDENTS AND MISINTERPRETED PRECEDENTS IT DID ACKNOWLEDGE?

Defendants/Appellees' Answer: Yes

II. IS THE COURT'S RELIANCE ON *TRUDEAU* MISPLACED?

Defendants/Appellees' Answer: Yes

III. IS WALKING A PUBLIC TRUST RIGHT IN MICHIGAN?

Defendants/Appellees' Answer: No

IV. DOES THE COURT'S DECISION EFFECT A TAKING AND VIOLATE DUE PROCESS?

Defendants/Appellees' Answer: Yes

STATEMENT OF FACTS

Defendants rely upon the Statement of Facts contained in its Supreme Court Brief on Appeal.

INTRODUCTION

> And, while it was said that it was quite common to use the shore for various purposes of passage, that was regarded not as rightful, but merely by sufferance, and analogous to the frequent passage over uninclosed lands, which was not lawful, but was seldom complained of. *Lorman* v *Benson*, 8 Mich 18, (1860).

With its decision in this case, this esteemed Court has, with due respect, committed grave error, working a grave injustice upon tens of thousands of families owning waterfront property in Michigan, and missing an historic opportunity to confirm Michigan law. Despite this Court's[1] pronouncement to the contrary, the Court has indeed changed the law in Michigan. If followed, the effect of the decision will not simply be to allow people to walk the beach. They will now hunt, fish, swim, bathe, and drive vehicles in front of the homes and cottages of thousands of families across the State. Families who have long enjoyed respite at these dwellings will now be at the mercy of the State and local governments to control these uses. To reach this radical result, the Court has wrongfully ignored its own precedents properly presented to it; it has misinterpreted the precedents it did acknowledge; it has improperly relied on dictum, dissenting, and concurring opinions for authority; it has mistaken or misrepresented concurring opinions as those of a majority; it has misrepresented Defendants' position; it has ignored the precedents of our sister Great Lakes states, seizing only upon a single decision of a single state in which the issue was uncontested and contrary to prior precedent; and, not insignificantly, it has ignored the pronouncements of the U.S. Supreme Court.

---

[1] Defendants respectfully submit that the poor reasoning of the Court's decision, as well as its failure to better define the ordinary high water mark, will not help settle Michigan law, but will instead spark additional debate and legislative and judicial action, consuming State and private resources for many years and decades to come. This is exactly the opposite of the decision in *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), which sought to provide to the Legislative and executive branches a "more precise statement of the legal situation," and which opinion was clear and well-followed for 75 years.

So unprecedented is this Court's expansion of the public trust doctrine that it greatly exceeded the demands of the trustee,[2] and surprised counsel for the complaining beneficiary.[3] It runs contrary to a well-established principle of law that has prevailed since at least 1930, and which has informed state policy since that time.

By changing such a firmly understood and acknowledged rule of property under the guise of "finding" the common law, this Court has, as suggested by the amicus brief of the Michigan Chamber of Commerce, usurped the legislative power contrary to the Michigan Constitution; it has abdicated its paramount and solemn duty to uphold the state and federal constitutions and their protection of private property; and it has effected a substantial injustice to the families owning cottages, homes, and small businesses along Michigan's coastline without their being a party. The result is a rule of law that is unfamiliar in Michigan and most other Great Lakes states. If followed, the Court's new rule will not preserve, but will substantially change, usage of this state's Great Lakes shores, contrary to the reasonable and legitimate expectations of this state's transferees of shoreline property. This Court should reconsider its decision, correcting the substantial errors outlined above, as more specifically identified in this brief, and confirm the rule of riparian title and exclusive use, subject to the public's right of navigation, to the water's edge.

---

[2] The brief of the MDEQ and the MDNR agreed that Plaintiff had no right to walk on Defendant's dry shore. See Brief of Amici Curae, the Michigan Departments of Environmental Quality and Natural Resources, p 28.

[3] Plaintiff's counsel was quoted as saying "never in a million years" did she think the walkers' cause would get the support among the justices that it did. *Michigan Supreme Court Ends Term With Land-Use Ruling, Other Cases,* Detroit News, Saturday, August 6, 2005.

ARGUMENT

I. THIS COURT HAS WRONGFULLY IGNORED ITS OWN PRECEDENTS AND MISINTERPRETED PRECEDENTS IT DID CONCEDE.

A. This Court Has Ignored Its Predecential Statements From *Hilt* and *Peterman*, Followed by the State for Decades, Which Granted Exclusive Use to the Riparian.

In the words of Justice Weist, who dissented from the decision in *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), that decision "constitutes the Michigan shoreline of 1,624 miles private property, *and thus destroys for all time the trust* vested in the state for the *use and benefit* of its citizens (emphasis added)." *Id.* at 231. In view of this Court's decision in the case at bar, it appears Justice Weist severely underestimated the power of today's Court, for with its decision, public use and benefit of the shore, if it ever existed, is suddenly back! To achieve this *fait accompli*, this Court has overruled the holding of the Court of Appeals—granting exclusive use to the water's edge—by ignoring the precedent that court relied upon. The Court of Appeals cited both *Hilt* v *Weber* and *Peterman* v *Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994) to support its "exclusive use" holding. See *Glass* v *Goeckel*, 262 Mich App 29, 40-41; 683 NW2d 719 (2005). This Court in *Hilt* was very explicit about the nature of riparian rights, naming four specific rights. The third right named was "access to navigable waters." *Id.* at 225. The *Hilt* Court then described this right further:

> Most of the upland owners' rights are included in the general right of access, which is quite broad. *Id.* at 226.

In listing those rights, the *Hilt* Court said:

> *The riparian owner has the exclusive use of the bank and shore*, and may erect bathing houses and structures thereon for his business or pleasure (emphasis added). *Id.*

In a 1978 opinion reflecting state policy both before and after its issuance, this State's Attorney General cited the *Hilt* Court's reference to "exclusive use" in opining that riparians had exclusive use and trespass control to the water's edge. 1978 OAG No 5327 (July 6, 1978). Finally, this Court in *Peterman* referenced with approval the riparian's right of "exclusive use of the bank and shore" before reinstating a damage award in favor of the riparian for loss of his beach. *Peterman* at 192.

Despite the fact that this Court has twice specifically held, in clear and unequivocal language, that the riparian is entitled to exclusive use, and despite the fact that these holdings[4] have informed state policy since 1930 through today, this Court has imposed a public use on Defendants' land without mention *by a single justice of the majority* of these important precedential statements. This Court should not ignore such obvious and direct precedential statements on a key issue before it. This Court still follows the rule of *stare decisis*, and is duty-bound to acknowledge prior decisions of this Court properly brought to its attention, and to either follow them, distinguish them, modify them, or overrule them. The Court of Appeals, the litigants, and the residents of this State deserve to see these precedents acknowledged and addressed. Certainly, when Justice Weist in *Hilt* asserted his belief that the decision would destroy public trust "use and benefit" of the shoreline, he had assumed this Court would acknowledge and understand that decision. Defendants respectfully submit that only by ignoring the *Hilt* Court's "exclusive use" rule and misinterpreting that decision's finely crafted pages can this Court resurrect what Justice Weist pronounced dead.

[4] Defendants use the term "holdings" to be consistent with this Court's usage of the term. For example, see this Court's characterization of language quoted with approval from another case in *Peterman* at 198. Opinion, pp 21, 40.

B. This Court Has Otherwise Failed to Properly Acknowledge *Hilt*.

Since 1930, this Court's decision in *Hilt* v *Weber*, has, without contest, represented the law in Michigan. It has been the "leading decision" on the issue of riparian rights. (See Exhibit 1). Until now, no decision of any court has suggested that *Hilt* stood for anything other than the dividing line of public and private rights, excepting the right of navigation. Yet this Court criticizes the Michigan Court of Appeals for its reliance on *Hilt*, stating:

> But our concern in *Hilt* was the boundary of a littoral landowner's *private* title, rather than the public trust.

Opinion, p 25. This is an inaccurate characterization of the issue involved in *Hilt*. The issue in *Hilt* was the extension of the public trust to the meander line effected by the *Kavanaugh cases*. The land contract purchaser did not want to pay because of the cloud on his title brought about by those cases. Thus, the boundary of the State's public trust was the issue presented. So that all of us—including the majority in this case—could understand this point, the *Hilt* Court purposefully demonstrated it near the bottom of page 224 of its decision. There Justice Fead tells us precisely the type of title that the *Kavanaugh* cases had granted to the state, which the *Hilt* Court was overruling: public trust title, and not "absolute title." The *Hilt* Court then tells us very specifically that it is this very concept of title—public trust title—which it rejects with its water's edge decision, and places that title back into the hands of the riparian free of public trust rights:

> Perhaps, also, some of the apprehension of the extent of the injury to the state and its citizens would be allayed if the scope of the *Kavanaugh* decisions were not so misunderstood and misrepresented. The notion seems to be widespread, in official as well as in private circles, that they gave the State substantially absolute title so it can sell or lease the lake shores to strangers to the upland or use them for any public purposes. On the contrary, while declaring the legal title in fee to be in the State, *they confirmed its ownership to the same trust which applies to the bed of the*

> *lake, i.e., that the State has title in its sovereign capacity and only for the preservation of the public rights of navigation, fishing, and hunting* (emphasis added). *Id.* at 224.

Indeed, by placing the title to the land between the meander line and the water's edge in the riparian, the *Hilt* Court intended its ruling to eliminate "the overhanging threat of the State's claim of right to occupy it for State purposes" inherent in that doctrine. *Id.* at 227.[5] Thus, when the *Hilt* Court overruled the *Kavanaugh* cases and limited the State's title to the water's edge, there can be no debate that this Court was speaking *specifically* to the boundary of the state's public trust title. Moreover, the Court in *Hilt* could not have found for the seller had the Court moved the public trust title to the shoreline, but left the public trust on the shore, as this Court implies must have happened. The issue in *Hilt* was misrepresentation of title. *Hilt* at 227. The seller had represented his title as being "fee simple absolute." *Hilt* record, pp 1-2, 12, 14 (See Exhibit 2). Had this Court found the shore burdened by the public trust, the seller would have been unable to deliver "fee simple absolute title," which entails a number of rights inconsistent with the public trust. *See* Cameron, Michigan Real Property Law, 3rd Ed, §7.8, p 262 (ICLE 2005). Because the seller's title went to the water's edge, the *Hilt* Court found no misrepresentation. *Id.* at 227.

Equally unsupportable is this Court's gratuitous assertion that relicted land "is not at issue in this case." Opinion, p 25, note 18. Whether this Court's assertion is a statement of fact or law, it is equally incorrect. As a factual matter, Defendants specifically asserted that land at issue was relicted land. Defendants' brief, p 14:

> In Argument 1 3A, Plaintiff attempts to distort the clearly enunciated adoption of the moveable freehold doctrine in *Hilt* by arguing that the

[5] It is indeed ironic that this Court today brings to fruition the very threat it thought it eliminated 75 years ago. That this Court does so without properly acknowledging its prior unequivocal statements that the riparian has "exclusive use of the bank and shore" is instructive.

> doctrine is limited to a rule of accretion and reliction resulting in *permanent* changes. This is unsupportable.

Moreover, the land at issue in this case clearly is within the meaning of "relicted land" as that term was used in *Hilt*, as set forth in Save Our Shoreline's brief at pp 21-26 and in Defendants' brief at p 14. See also *Kavanaugh* v *Baird* at 242:

> The trial judge found the strip was the result of accretions, but we are satisfied from the record and the facts of which we take judicial notice that it was formed by both accretions and reliction, the latter being the most potent. Saginaw Bay is very shallow at the shores and but slight recession of the water uncovers a large area.

Aside from the parties, the Court of Appeals clearly considered the rule of reliction at issue in this case, as it specifically refers to the rule. *Glass* v *Goeckel*, 262 Mich App 29, 42; 683 NW2d 719 (2005). The characterization of the land at issue in both *Hilt* and this case was a substantial issue in this case presented by the briefs. This Court's attempt to address the issue in an unsupported footnote, and to suggest the case did not involve the issue of reliction, is disingenuous.

This Court's inaccurate assertion that *Hilt* did not address the boundary of the public trust also belies what occurred in *Kavanaugh* v *Baird*, a case decided before *Hilt*, but later reconsidered and reversed in light of *Hilt*. The contest in that suit to quiet title was between the State, which asserted title under the "Trust Doctrine" to the meander line, and Kavanaugh, a riparian owner who asserted absolute title to "the low water mark or the water's edge." *Steinberg*, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," The American Journal of Legal History, Vol XXXVII (1993) at 80. This Court affirmed a decision in favor of the State, which decision "fixed the title to the land in question in the state in trust for its people." *Kavanaugh* at 253. But after the *Hilt* decision specifically overruled *Kavanaugh,* this Court *sua sponte* ordered a rehearing in *Kavanaugh* and, after noting its decision in *Hilt,* ruled:

> In the orderly administration of justice, this necessitates the court now holding that the plaintiff herein is entitled to a decree quieting the title in him to the relicted land involved as prayed in his bill of complaint. *Kavanaugh* v *Baird*, 253 Mich 631; 235 NW 871 (1931).

Certainly, the *Baird* Court would not have reverted the public's title in trust down to the low water mark or water's edge,[6] referencing only the *Hilt* decision, had the decision in *Hilt* not found the low water mark or water's edge as the boundary of the public trust.[7]

Further illuminating the intent of the *Hilt* Court to eliminate public trust rights between the water's edge and the meander line is the post-*Hilt* reversal of *Staub* v *Tripp*, 248 Mich 45; 226 NW 667 (1929), rev'd 253 Mich 633; 235 NW 844 (1931). In *Staub*, a riparian owner sought to plat land "between the meander line and the water of [Lake Michigan]." *Id.*, 248 Mich at 46. The state rejected the plat on the grounds that, under the *Kavanaugh* cases, the State owned that land. The riparian therefore sued his grantor, asserting a "breach of covenant of title."[8] This Court affirmed a judgment of damages in favor of the riparian against his grantor on the basis of the breach of title. In doing so, this Court noted many of the resulting restrictions on his land as a consequence of the state's title. But after *Hilt*, this Court reversed its decision, holding that because the riparian's "title extended beyond the meander line to the water's edge, there was in fact no failure of title." *Id.* at 634. Surely, the Court would not have so held if it

---

[6] The *Kavanaugh* Court's reference to the Plaintiff's complaint in that case, which apparently treats low water mark and water's edge as one and the same, is significant. *A fortiori,* if low water mark and water's edge were synonymous, then "high water mark" is similarly synonymous. That the *Hilt* court believed so is evidenced in numerous places in its decision, including its reference to *People* v *Warner,* 116 Mich 228; 74 NW 705 (1898) (suggesting absence of tides "practically makes high and low water mark identical") and at the bottom of p 212 (equating "lowest water mark" to "water's edge.")

[7] The *Kavanaugh* decision affects the platted lots of Aplin Beach in Bay County. That decision is now *res judicata*. Consider the implications of today's *Glass* v *Goeckel* decision on the residents of Aplin Beach, and whether the dry beaches on their lots are now subjected to the public trust despite their grantor's victory against the State. To suggest those lots between water's edge and the meander line remain subject to the public trust would be preposterous.

[8] Although not described by the *Staub* court, a warranty deed carries with it several implied covenants of title, including a warranty that the title is "free from all encumbrances." MCL

thought the property burdened by the public trust rights or the right of passage on dry land now imposed by this Court.[9] These cases demonstrate that, with thousands of warranty deeds written in light of prior precedent, warranting title to riparian land, this Court's decision is sure to open the floodgates of litigation, with riparians claiming that their grantor's deeds warranted against such public use.

C. This Court Has Mischaracterized *Peterman* and Ignored Its Result.

The thrust of this Court's decision in this case, from pages 21-26, rests on the following assertion:

> Michigan's courts have adopted the ordinary high water mark as the landward *boundary* of the public trust (emphasis added). *Id.* at 21.

As to the Great Lakes, this assertion cannot be sustained, and the Court's attempts to do so fall far short. No Michigan case has *ever* held that on the Great Lakes, the ordinary high water mark constitutes the boundary of the public trust.

In an attempt to support its assertion, this Court misinterprets the decision of *Peterman* v *Dep't of Natural Resources*, 446 Mich 177, 198-199; 521 NW2d 499 (1994), asserting that in that case:

> We held that public rights end at the ordinary high water mark. Opinion, p 21.

There was no such "holding" in *Peterman,* and this Court's elevation of citing another case with approval to the status of a "holding" is alarming. See Opinion, p 40. Instead, the "holding" in *Peterman* was that the state must compensate the riparian for destruction of his beach, even that

---

§565.151. "Anything that constitutes a burden on the title is an encumbrance, including a right of way . . ." Cameron, *Michigan Real Property Law*, §10.22 (1985).

[9] Another failure-of-title case is *Klais* v *Danowski*, 373 Mich 262; 129 NW2d 414 (1964), where the land contract vendee alleged breach due to a failure of "marketable title" resulting from the State's claim that the land at issue was submerged land. This court found that the State had no title, and therefore found no breach.

portion below the alleged "ordinary high water mark." In its reasoning, the *Peterman* Court noted the federal navigational servitude. It also cited a case finding that the "*limit* of the public's right is the ordinary high water mark of the *river* (emphasis added)" at issue in that case, but it cited no case involving the Great Lakes. *Id.* at 198. The *Peterman* Court then acknowledged "the general rule that only the loss of fast lands must be compensated," presumably as a result of the federal navigational servitude and the Michigan rule as to rivers. *Id.* at 200. This Court did not decide the case on this basis, but on other grounds: the negligent design of the boat launch. There was no "holding" in *Peterman* that public rights on the Great Lakes independent of the navigational servitude extend at all times to any so-called "ordinary high water mark," and because it was not necessary to deciding the case, any such holding would have been dictum.

Missed by the majority opinion of this Court in the case at bar is the result of *Peterman*: that the Plaintiff was awarded compensation for his lost "property" without deduction for any so-called "public trust rights" now said to exist by this Court. The *Peterman* Court affirmed an award of damages in the amount of $35,000 in favor of the riparian and against the state for destruction of his property, including that portion below the so-called ordinary high water mark:[10]

> We hold that . . . compensation must be awarded for the loss of the beach . . . Hence, we reverse the judgment of the Court of Appeals in part and reinstate the damages awarded by the trial court. Id. at 208.

Of course, to determine whether an award for loss of property was appropriate, the Court had to first consider the nature of the property rights to be taken, and then determine whether those rights are protected by law. *Id.* at 191-193. After noting that "riparian rights are property," the

[10] This Court acknowledges that the plaintiff in *Peterman* was awarded damages for property above the so-called "ordinary high water mark," but wholly ignores in its opinion that this Court affirmed an award of damages below that mark. (Opinion, p 21). Of course, the Court cannot fully appreciate the significance of the *Peterman* award of damages for loss of the beach if it will not acknowledge the holding.

Court defined some of the riparian rights relevant to the case,[11] including the right to natural flow of a stream, the right of exclusive use, and the right to acquisitions through accretion or reliction. The Court specifically quoted with approval from *Hilt* that "[t]he riparian owner has exclusive use of the bank and shore." *Id.* at 192. Since the navigational servitude did not in that case insulate the state from liability, this Court awarded the riparian damage for the loss of his property—derived from his riparian rights—including his constitutionally protected right of exclusive use.

This Court now denies the existence of the same property right—the right of exclusive use—it demanded be compensated in *Peterman*. It does so by relying upon a footnote from *Peterman*, and therefrom concluding that *Peterman* "rooted [the] 'navigational servitude' in the public trust doctrine." Opinion, p 21, citing *Peterman* at 194, n 22. Whatever the "roots" of the navigational servitude, this Court cannot fairly deny that between the competing rights of the public and the Great Lakes riparian owner, only the navigational servitude has been previously found by this Court to override riparian rights, including the right of exclusive use. Though not acknowledged by this Court in its opinion, this fact led the *Hilt* Court to quote with approval a Connecticut decision:

> The only substantial paramount public right is the right to the free and unobstructed use of navigational waters for navigation. Id. at 226, citing *Town of Orange* v *Resnick*, 94 Conn 573, 578; 109 Atl 864 (19__) .

The *Peterman* decision, awarding damages to Plaintiff for loss of "natural flow of stream," for loss of his "exclusive use," and loss of sand from "acquisitions to land, through accession or reliction," is evidence of that rule. Had this Court believed in 1994 that Plaintiff's land was

---

[11] That the *Peterman* decision listed only a few riparian rights relevant to its decision, while omitting others (see, eg, *Hilt* at 225), evidences the fact that the Court intended to compensate Plaintiff for the rights listed by its ruling.

subject to public uses of hunting, fishing, or boating, or "activities inherent in the exercise of those rights," such as this Court's new right of beach walking, it certainly would have noted those rights as affecting the amount of damages. Instead, the *Peterman* Court reminded us of the riparian's right of "exclusive use of the bank and shore." As noted above, this Court offers no explanation of how this Court could announce and implement a rule of exclusive use in both *Hilt* and *Peterman*, but now impose a public use. Instead, it ignores its prior statements in *Hilt* and *Peterman*.

Finally, but not insignificantly, *Peterman* is a curious decision on which to base the Court's new expansion of the public trust doctrine. The briefs on appeal from both sides in that case assumed without question that the beach at issue was plaintiff's beach. Instead, the focus of the briefs was whether the state's groins along a boat launch constituted a "trespass-nuisance" and were therefore not subject to governmental immunity. The briefs, therefore, said nothing of ownership, the dividing line of ownership, or the public trust. After oral argument, the Court ordered the parties to brief the issue of unconstitutional taking. Portions of those briefs discussed the navigational servitude and its effect on takings claims. Still, however, there was no discussion of the public trust, the division between public and private rights, or the extent of riparian title. The sole exception is the following two-sentence assertion of the MDEQ made at the end of its 32-page supplemental brief, which brief had characterized the beach or shoreline in question as being that of "plaintiff" numerous times:

> In addition, plaintiffs presented no evidence whatsoever at trial showing where the ordinary high water mark is located with respect to their property. This is significant to note because the State of Michigan holds title to the bottomlands of the Great Lakes, *Hilt* v *Weber*, 252 Mich 198, 122 NW 159 (1930), and, therefore, any erosion or other change in the

> shoreline or beach area that occurred lakeward of the ordinary high water mark is not compensable. *Id.* at 32.[12]

As a result, this Court in *Peterman* embarked on its lengthy analysis of riparian rights and its discussion of the public trust without the benefit of briefing. Moreover, because the Court ultimately rested its decision on the negligent construction of the groins, its discussion on the foregoing issues was dictum, and lacks the force of precedent under principles of *stare decisis*. *People* v *Borchard—Ruhland*, 460 Mich 278; 597 NW2d (1999).

Members of this Court have vigorously eschewed the use of dictum to decide controversies, especially where the issues contained in dictum were not briefed by the parties. See *People* v *Bell*, 473 Mich 275; —NW2d—[2005 WL 1705813 (Mich)] (2005) (Opinions of Weaver, J, Kelly, J and Cavanaugh, J); *Lugo* v *Ameritech Corp Inc,* 464 Mich 512; 629 NW2d 384 (2001) (Weaver, J: "The severe harm standard is not at issue on the facts of this case, is not briefed by the parties, and is not essential to the determination of this case.") Justice Cavanaugh has been especially critical of decisions made without sufficient briefing, as occurred in *Peterman* and *State* v *Trudeau*, 139 Wis 2d 91, 103; 408 NW2d 33 (1987), both heavily relied upon by this Court in the case at bar:

> The majority claims that any briefing on the propriety of the rule in *McCummings* would be a waste of time because 'additional briefing would not assist the Court in addressing this question of law.' Op. at 58. This comment flies in the face of the foundations of our adversarial system, in which the parties frame the issues and arguments for a (presumably) passive tribunal. The adversarial system ensures the best presentation of arguments and theories because each party is motivated to succeed. Moreover, the adversarial system attempts to ensure that an active judge refrain from allowing a preliminary understanding of the issues to improperly influence the final decision. This allows the judiciary to keep an open mind until the proofs and arguments have been adequately submitted. In spite of these underlying concerns, the majority today claims that the benefits of full briefing are simply a formality that can be

[12] Of course, *Hilt* does not stand for this proposition, as we and our supporting amici have briefed.

> discarded without care. The majority fails to comprehend how the skilled advocates in this case could have added anything insightful in the debate over the proper interpretation of a century's worth of precedent. Whatever its motivation, the majority undermines the foundations of our adversarial system. *Mack* v *City of Detroit,* 467 Mich 186, 222-223; 649 NW2d 47 (2002).

Finally, aside from *Peterman*, the only other direct authority this Court offers for its proposition that our courts "have adopted the ordinary high water mark as the landward boundary of the public trust" is *State v Venice of America Land Co*, 160 Mich 680; 125 NW 770 (1910), and specifically pages 701-702. Defendants have looked in vain to find any reference to the promised holding or any reference to the "ordinary high water mark" on those pages because, of course, it is not there. In truth, there is nothing in *Venice* which could be read to support the meaning this Court attributes to it. Aside from a review of the decision itself, this point is immediately suggested by the Court's unwillingness to direct us to the specific language it references and explain how it supports its decision.

The third and last Michigan authority this Court relies upon for its novel assertion that the ordinary high water mark is the landward boundary of the public trust on the Great Lakes is *People* v *Broedell*, 365 Mich 201, 206; 112 NW2d 517 (1961), and its supposed "suggestion" that there is some ambiguity in the law. The referenced language from the *Broedell* Court is the very epitome of dicta, that Court quickly noting that the decision "may be controlled by another factor" which it proceeded to determine the case upon. If this Court thought the dicta in *Broedell* persuasive, it should have paid heed to that court's acknowledgment that "this Court *has referred* to the low water mark as the boundary of the trust ownership of the state (emphasis added)."[13] In contrast, "language seemingly favorable to the high water mark theory" falls far short of

[13] Like every decision before it, the *Broedell* decision certainly did not anticipate that there would be two separate lines on the Great Lakes—one for ownership and another for public trust rights—manufactured by this Court in the case at bar.

establishing precedent. By its own admission, the *Broedell* Court did not fully consider the question before this Court, and this Court's reliance on that decision to establish a non-existent ambiguity in the law is misplaced.

Finally, while not offering it in its main text, this court at note 16 asserts:

> In *Collins,* supra at 60, (Fellows, J, concurring), our Court differed and used the high water mark as the boundary to private title [on an inland stream].

Once again, this Court stretches. It is axiomatic that a concurring opinion does not speak for the Court. The issue in *Collins* v *Gerhardt*, 237 Mich 38; 211 NW 115 (1926) was whether a riparian on a stream could exclude the public from fishing in the stream. The case presented no question of boundary, and none was discussed in the majority opinion of Justice McDonald, joined by Justices Sharpe, Snow, Fellows, and Clark. Justice Fellows wrote separately because he had "pronounced views" on the topic, apparently views that his brethren did not share. How this esteemed Court can attribute Justice Fellows' views as those of the entire Court is bewildering. Interestingly, though this Court refers us to page 60 of the opinion for its high water mark holding, we can see at that page only a brief quotation of another court's holding, without any indication of whether Justice Fellows agreed.[14]

The foregoing demonstrates that the concept of ordinary high water mark as a *boundary* of public trust on the Great Lakes is foreign in this State. As we shall demonstrate below, it remains foreign in law of our Great Lakes neighbors, except one whose recent caselaw is weakly rooted.

---

[14] Justice Fellows' opinion quotes numerous precedents which conflict with this Court's newly found rights. See, eg, *Id.* at 53, citing *Peck* v *Lockwood*, 5 Day 22 (Conn 1811) ("the right of fishing on the soil of another, when overflowed with the tide from the sea, or arm of the sea, is a common right.") Under this court's methodology employed in today's opinion, Justice Fellows' citation of these authorities would mean they, too, represent the view of this Court.

II. THIS COURT'S RELIANCE ON *TRUDEAU* IS MISPLACED.

There can, of course, be no better evidence that this Court makes a new rule for Michigan, in violation of constitutional protections, than its resort to Wisconsin law to define the Court's newly set boundary for public trust rights. Unnecessary and irrelevant in Michigan jurisprudence for 167 years, this Court now searches elsewhere to define a boundary for its newly granted rights. It is instructive that, despite Justice Kelly's assertions at oral argument, this Court does not cite a decision from any other neighboring Great Lakes states referring to a right to walk upon the dry shore.

In any event, the decision in *State* v *Trudeau*, 139 Wis 2d 91; 408 NW2d 33 (1987) makes for a weak foundation upon which to base a new rule for Michigan. In *Trudeau*, the defendant did not contest the State's assertion that the ordinary high water mark represented the boundary of the lake. Rather, it readily admitted it in its brief:

> The state's interest is limited to the land area within the ordinary high water mark.

Brief and Appendix of Defendants—Respondents and Petitioners, p 13. Instead, the Defendant was convinced that his property, which was across the road from the lake, was not within the ordinary high water mark of the lake. That the *Trudeau* court conducted little research is suggested by that court's opinion on this issue, which is a virtual reprint of the State's brief in that case. *See Trudeau* at 101-102; Brief and Appendix of Plaintiff—Appellant and Respondent, pp 18-20 (See Exhibit 3). Of course, as a biased litigant, the state did not mention *Jansky* v *City of Two Rivers,* 227 Wis 228; 278 NW 527 (1938), which relied upon *Doemel* v *Jantz*, 180 Wis 225; 193 NW 393 (1923), among other cases. In *Jansky*, a unanimous Wisconsin Supreme Court held as follows:

> Consequently, by virtue of their deed, describing lots which, as platted, were bounded by Lake Michigan, the plaintiffs became riparian owners, and as such owners are entitled to all land extending to the natural shoreline as it was in 1835, and as it changed from time to time thereafter by reason of accretions formed upon or against that land, or by reason of the uncovering of portions of the adjoining bed of the lake by the gradual retrocession of the water therefrom. *Jansky*, 278 NW at 530-531.

Therefore, until the uninformed *Trudeau* decision in 1987, the so-called "ordinary high water mark" was not applied to the Great Lakes in Wisconsin. Thus, this Court's statement that the *Trudeau* court's ordinary high water mark definition "has served another Great Lakes state for some hundred years" rings hollow. Opinion, pp 29-30.

III. WALKING IS NOT A PUBLIC TRUST RIGHT IN MICHIGAN, AND THIS COURT'S CHANGE OF THE LAW IS ILL-ADVISED.

To support its unprecedented claim that shoreline walking is a public right, this Court "first note[s] that neither party contests that walking falls within public rights traditionally protected under our public trust doctrine." Opinion, p 32. The Court then elevates this to the parties' "agreement." Like myriad assertions in this Court's opinion, this one distorts the true facts. After noting a statutory listing of the rights of the public, including "hunting, fishing, swimming, pleasure boating, or navigation," Defendants' brief states unequivocally:

> Nowhere does the Act, the case law interpreting the Act or the public trust doctrine as recognized by Michigan Courts grant the public the additional right to walk along the shore on private property. To the contrary, as discussed above, the cases and the Act limit the public's rights under the public trust doctrine to uses associated with activities on or in the water itself. Defendants' Brief, p 28.

Defendants therefore demonstrated that walking was not one of "the rights of the public," either by statute or common law, because it was not a use "associated with activities on or in the water itself." *Id.* Thus, the first basis of this Court's "right to walk"—"the parties agreement"—is a fallacy.

This leaves the Court with only a bare assertion—one that over 160 years of history along the Great Lakes shores proves untrue:

> In order to engage in those activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark. Opinion, p 33.

For 167 years, excepting the *Kavanaugh* years, the public has fished, hunted, and navigated without exercising "a right of passage" over Michigan's shores. Moreover, the public has done so in light of the presumed enforcement of the State's long-held position that riparian lands were privately controlled. The public has nevertheless fished or hunted, but it has done so from boats or shallow waters. The Court fails to demonstrate why the public *must* "have a right of passage" on the shores to exercise these rights. The Court's bare assertion, without any reference to precedent, and without any factual support, is fallacious.

Unmentioned is the authority of *Lorman* v *Benson*, supra, quoted in this brief's Introduction, *supra*, which recognizes that walking the shores is not "rightful," but is done at sufferance of the owner. *Id.* at 30. Once again, this Court ignores precedent to reach its result. That result, of course, is to now invite the public to do something never before seen in Michigan: to use private beaches for hunting, fishing, and recreational boating for sure, as these rights the Court has clearly acknowledged. Opinion, p 32. Uses also suggested by the Court's opinion include swimming, bathing, and "sustenance." Opinion, p 18, 33. Logic also dictates that if walking the beach is an "inherent" part of fishing and hunting, then dogs, four-wheelers, and snowmobiles must be included, too. The peace and tranquility enjoyed by riparians since before statehood will now be enjoyed only at the discretion of the state or local governments and their policing authorities.

Michigan's beaches are not equivalent to vast ocean beaches. Unlike Justice Young's photograph, they are often narrow, with crowded homes on small lots within a few feet of the shore. Homeowners adjoining public parks, road ends, and access easements will be especially hard hit by this Court's decision, as those homeowners will now have to compete with the public to enjoy what often is a small beach in front of their home or cottage. A municipality seeking to provide public recreational area now need only buy a few feet of access, and allow the public to crowd the beachfronts of nearby homes. Over time, this Court's decision will effect a drastic change in the nature of Michigan's beaches. This is not what riparians bargained for when they purchased their land. This is not the "exclusive use" that this Court promised riparians in *Hilt* when it endeavored to encourage "development of the lake shores." *Hilt* at 226, 227. This is not the fee title, free of public trust rights, that it awarded Mr. Kavanaugh on reconsideration in *Kavanaugh* v *Baird*, supra.

This Court's unprecedented utilization of the public trust doctrine of this state effects a grave injustice to riparian owners. In the words of this Court:

> For the courts to hold on any conceivable finespun theory that they are not entitled to compensation for the damage suffered would be to do them a grievous wrong which would be a blot on the jurisprudence of the State of Michigan. The solid foundation upon which the civil liberties of the American people rest is the proposition that no man shall be deprived of his property, his liberty, or his life without due process of law.

Bator v *Ford Motor Co*, 269 Mich 648, 671; 257 NW 906 (1934).

IV. THE COURT'S DECISION EFFECTS A TAKING AND VIOLATES DUE PROCESS.

Since at least 1930, as a result of this Court's decisions and pronouncements in *Hilt*, *Kavanaugh*, *Staub*, and *Peterman*, riparians have as a matter of fact enjoyed exclusive use of their property. The State's chief law enforcement officer—the attorney general—has consistently acknowledged the rule[15] and as a result, this Court could take judicial notice of the fact that law enforcement officials throughout the State have enforced the rule.[16] As described in the briefs filed with the Court, the State, through the MDEQ and the MDNR, have consistently acknowledged, distributed for public consumption, and followed the rule. That the public nevertheless walked the beach at the sufferance of the true owner does not in any way affect the rule. *Lorman* v *Benson*, 8 Mich 18, 30 (1860). This Court cannot, and does not, dispute that the rule of exclusive riparian use has been the firm, consistent, applied, and acknowledged rule among the courts, the bar, the State and its law enforcement departments since at least 1930.

This Court cannot fairly deny that its decision in this case changes that rule, and the practices that resulted from the rule. The opinion implicitly concedes this fact when it must resort to Wisconsin law to define the extent of rights "found," and then—in what seems to be an invitation—reminds us that the Legislature can regulate those rights. Opinion, p 36.

---

[15] See, eg, OAG 1978, No 5327 (July 6, 1978) ("The riparian has the exclusive use of the bank and shore . . .") and correspondence from Frank J. Kelley, Attorney General, to Robert M. Hea dated June 5, 1968 ("with respect to the Great Lakes, a riparian owner (one who owns land bordering the lake), owns the land between the meander line and the water, has exclusive use of the bank and shore, and may erect bathing houses and structures thereon . . .") See Exhibit 4.

[16] See, eg, correspondence dated 9-25-87 from Arenac County Prosecutor Jack W. Scully to James Balten ("A riparian owns to the water. The above being the case, a riparian may prohibit non-owners from the use of the strip of land between the upland and the water's edge.") See Exhibit 5.

While "the states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit,"[17] once defined, this Court may not take those rights away without just compensation. Moreover, while this Court defines Michigan's common law, to do so is not without limits:

> As a general matter, the Constitution leaves the law of real property to the states. But . . . a state may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights." *Stevens* v *City of Cannon Beach*, 510 US 1207, 1211; 114 S Ct 1332; 127 LEd2d 679 (1994) (Scalia, J, dissenting from denial of certiorari), citing *Lucas* v *South Carolina Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 LEd2d 798 (1992).

See generally Sarratt, *Note: Judicial Takings and the Course Pursued*, 90 Va L Rev 1487 (2004). In *Lucas*, the US Supreme Court quoted with approval from *Webb's Fabulous Pharmacies, Inc* v *Beckwith*, 449 US 155, 164; 101 S Ct 446, 452; 66 LEd2d 358 (1980):

> a state, by *ipse dixit*, may not transform private property into public property without compensation.

Lucas, 505 US at 1031. In *Phillips* v *Washington Legal Foundation*, 524 US 156, 167; 118 S Ct 1925; 141 LEd2d 174 (1998), the US Supreme Court said:

> a state may not sidestep the takings clause by disavowing traditional property interests long recognized under state law.

The principle that there are constitutional limits to what this Court may do in interpreting our common law is best explained by Justice Stewart in *Hughes* v *Washington*, 389 US 290; 296-298; 88 S Ct 438; 19 LEd2d 530 (1967). In his concurring opinion, he wrote:

> Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of

[17] Opinion, p 43, citing *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 475; 108 S Ct 791; 98 LEd2d 877 (1988).

> the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.
>
> We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, *unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court (emphasis added).

Plaintiff respectfully submits that the Court's decision in the case at bar—ignoring *Hilt's* long-standing exclusive rule, among other things—effects a taking in violation of our state and federal constitutions, and violates due process.

This result need not be the case. Justice Markman's well-reasoned opinion offered this Court an opportunity to make Michigan's shoreline rules crystal clear. Although this Court properly notes that his "wet sand" proposal is unprecedented (Opinion, pp 41-42), his proposed "wet sand" rule might more properly be implemented as a "clarification" of the "water's edge," a term that has not yet been defined in any Michigan case, than this Court's confiscatory "ordinary high water mark" rule. Though this Court violates constitutional protections when it ignores *Hilt's* "exclusive use" rule, among other things, this Court has the right, and indeed, the duty, to clarify the law. By clarifying the term "water's edge" to include the wet sands on the surface of the beach infused with water daily—equivalent to the rule applied to the sea as *Hilt* contemplated—this Court would stay in relative harmony with Michigan's precedent. This principle would also best serve the old English common law rule, contrasted from that of Roman law, that all property capable of productive use be privately owned. Kehoe, *The Next Wave in*

Public Beach Access: Removal of States as Trustees of Public Trust Properties, 63 Fordham L Rev 1913, 1919-1920 (1995).

CONCLUSION

Defendants will not dispute that the state has sought what riparians have—title to Michigan's Great Lakes shoreline, including exclusive use—for a long time. Over the last 100 years, it has asserted its claims against an unorganized public repeatedly. Yet the claims of the executive branch were rebuffed, first in *Hilt*, then with the Court's reconsideration and reversal of *Kavanaugh* v *Baird*. But after this Court's signal in *Broedell*, as demonstrated in Save Our Shoreline's brief, the executive branch moved quickly to claim rights to the ordinary high water mark and began a concerted effort to persuade the Legislature to act. In 1968, the Legislature passed a bill which its sponsor claimed defined the boundary at the ordinary high water mark as sought by the executive branch. All that was left was for this Court to countenance the move. In 2005, with editorial boards across the state demanding not allegiance to the law, but open beaches, this Court has met those demands. Defendants respectfully submit that the law demands something better.

WHEREFORE, Defendants Richard and Kathleen Goeckel respectfully request that this Honorable Court grant their Motion for Rehearing and hold that Defendants are entitled to exclusive use, as well as title, to the water's edge, free of public trust. Alternatively, Defendants request that this Honorable Court vacate its decision, and adopt the well-reasoned opinion of Justice Markman—which allows beach walking, but reduces or eliminates myriad other problems presented by the majority's decision—as its own.

Dated: August 18, 2005

Respectfully submitted,

SCOTT C. STRATTARD (P33167)
Attorneys for Defendants/Appellees
BRAUN, KENDRICK, FINKBEINER
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. BOX 30212
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

March 14, 2001

Honorable Ken Sikkema
State Senator
The Capitol
Lansing, MI

Dear Senator Sikkema:

The Attorney General has asked me to respond to your recent letter raising questions concerning a riparian owner's[1] interest in lands exposed by receding Great Lakes waters. Information supplied by your staff indicates that receding Great Lakes waters sometimes expose seaweed or other vegetation. The vegetation subsequently dies, emits noxious odors, or impedes a riparian owner's ability to launch recreational watercraft and to install or remove docks. To remedy the situation, the riparian owner desires to cut and remove the vegetation, and to rototill the land.

You first ask whether a Great Lakes riparian owner holds a fee title interest or merely an easement in lands exposed by receding Great Lakes waters. Persons owning Michigan lands that abut the Great Lakes possess certain riparian property rights to use the waters for general purposes such as bathing or domestic use, to have access to navigable waters, to wharf out to navigable waters, and to accretions (the addition of soil to land by gradual, natural deposits). *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930). Riparian owners own to the waters edge *at whatever stage*. (Emphasis added.) OAG, 1933-1934, pp 286-287 (July 13, 1933). *Hilt*, the leading case on the question, concludes that a Great Lakes riparian owner's fee title interest in the land follows the shoreline under what has been called "'a movable freehold.'" *Hilt*, 252 Mich at

[1] A riparian owner is an owner of land along or bordering on a river. A more technical term, littoral, is often used to designate that which borders on the sea or other tidal water. We use the term "riparian" in its broadest sense to refer either to the bank of a river or the shore of a lake such as the Great Lakes.

219, citing 28 Hallsbury, Laws of England, 361. Because the shoreline on the water's edge may be altered by increases or decreases in the water level, or other movement of the water, the riparian owner's right of access to

the water must be preserved. In the process, the riparian owner may gain or lose soil by virtue of the water's action. *Hilt*, 252 Mich at 219-220.

In Michigan, where property abuts a Great Lakes shoreline, the shoreline is the boundary of the property regardless of the subsequent advancement or recession of the water edge. *Hilt, supra*; *Cutliff v Densmore*, 354 Mich 586, 590; 93 NW 2d 307 (1958); *Weimer v Gilbert*, 7 Mich App 207, 216; 151 NW2d 348 (1967). The riparian owner's right of access to Great Lakes waters attaches to the entire shoreline; the riparian owner cannot be compelled to reach the water only from certain portions of the shoreline. *Hilt*, 252 Mich at 226.

Since the title to the bed of the Great Lakes is vested in the state as trustee for the people of the state, a riparian owner's right to use the lake bed (i.e., to build a wharf into abutting waters) is subject to the state's reasonable regulatory control. *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 413-416; 105 NW2d 143 (1960). Owners of lands abutting the Great Lakes are subject to the reasonable exercise of the police power by state or local governmental units, as provided by law. *Obrecht*, 361 Mich at 416.

You also ask what regulatory programs and agencies govern a Great Lakes riparian owner's use of lands exposed by receding Great Lakes lake waters, and whether a riparian owner may, without a state or local permit, cut and remove vegetation or rototill on such lands.

The Wetland Protection Act, as added by 1995 PA 59, as Part 303 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.30301 *et seq*; MSA 13A.30301 *et seq*, regulates shorelands that take on the character and identity of wetlands. Section 30304 of the NREPA provides that a person, without a permit from the state, "shall not do any of the following:"

(a) Deposit or permit the placing of fill material in a wetland.

(b) Dredge, remove, or permit the removal of soil or minerals from a wetland.

(c) Construct, operate, or maintain any use or development in a wetland.

(d) Drain surface water from a wetland.

The term "wetland" is defined by section 30301(d) as follows:

"Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh and which is any of the following:

(i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.

The NREPA also authorizes local units of government to regulate wetlands, subject to specific limitations. Sections 30307(4)-(6) and 30308. Local regulation, however, may not conflict with state regulation of wetlands. OAG, 1995-1996, No 6892, pp 138, 141 (March 5, 1996).

The Shorelands Protection and Management Act, as added by 1995 PA 59, as Part 323 of the NREPA, MCL 324.32301 *et seq*; MSA 13A.32301 *et seq*, regulates those Great Lakes shorelands determined by the state to be an "environmental area," "high risk area," or "flood risk area." Section 32301 of the NREPA defines these designation terms as follows:

(b) "Environmental area" means any area of the shoreland determined by the [state] on the basis of studies and surveys to be necessary for the preservation and maintenance of fish and wildlife.

(c) "High risk area" means an area of the shoreland that is determined by the [state] on the basis of studies and surveys to be subject to erosion.

* * *

(g) "Flood risk area" means the area of the shoreland that is determined by

> the [state] on the basis of studies and surveys to be subject to flooding from effects of levels of the Great Lakes and is not limited to 1,000 feet.

If the state determines a specific Great Lakes shoreland to be a high risk area, flood risk area, or environmental area, it must notify certain entities, including local units of government. Sections 32305, 32306, and 32307 of the NREPA. Moreover, when the state determines land to be a high risk area or environmental area, it must give notice to the affected landowner. State determinations of flood risk areas must include notice directly to the affected landowner, unless the state utilizes a general public notice and comment publication process. 1992 AACS, R 281.22, 1998 MR 8,
R 281.23, and 1992 AACS, R 281.24.

The Great Lakes Submerged Lands Act, as added by 1995 PA 59, as Part 325 of the NREPA, MCL 324.32501 *et seq*, MSA 13A.32501 *et seq*, regulates the use of Great Lakes bottomlands. Section 32502, which defines the boundaries of the public's interests in these bottomlands and regulates their use below a specified ordinary high-water mark, provides that:

> This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, . . . For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

In OAG, 1977-1978, No 5327, p 518 (July 6, 1978), the Attorney General analyzed the concept of ordinary high-water mark and concluded that:

> (2) The ordinary high water mark is set for all the Great Lakes by 1955 PA 247, *supra*, and when the water recedes below the ordinary high water mark, the riparian owner has control over the exposed area, but may not place any permanent structures, or do any dredging or filling on this land without a permit from the Department of Natural Resources.

The Great Lakes Submerged Lands Act further provides that "a person who excavates or fills or in any manner alters or modifies any of the land or waters subject to this part without the approval of the department is guilty of a misdemeanor." Section 32510(1).

Therefore, in answer to your second question, a Great Lakes riparian owner's use of lands exposed by receding Great Lakes lake waters, depending upon the physical characteristics of the exposed lands, may be subject to the Wetland Protection Act, the Shorelands Protection and Management Act, and the Great Lakes Submerged Lands Act, all of which are administered by the Michigan Department of Environmental Quality. The determination whether a riparian owner needs a permit before cutting and removing vegetation on such land or rototilling such land requires an examination of the specific land in question and necessitates a factual determination whether the land (i) is located below the statutory high-water mark, (ii) has taken on the character and identity of a wetland, or (iii) has been designated by the state to be an "environmental area," "high risk area," or "flood risk area." The question you pose is a mixed question of law and fact. The role of the Attorney General is to issue opinions solely on questions of law, not fact. MCL 14.32; MSA 3.185; *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300-301; 370 NW2d 328 (1985).

Under the federal Clean Water Act,[2] 33 USC 1251 *et seq*, the United States Army Corps of Engineers and the United States Environmental Protection Agency may exercise federal jurisdiction over activities affecting the waters of the United States, including adjacent wetlands. 33 CFR 328, *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, US ; 121 S Ct 675; L Ed 2d (January 9, 2001) (citing *United States v Riverside Bayview Homes, Inc*, 474 U.S. 121, 106 S Ct 455; 88 L Ed 2d 419 (1985)). Generally, the United States Army Corps of Engineers and the United States Environmental Protection Agency have delegated or deferred enforcement of federal environmental laws to the State of Michigan.

Sincerely,

William J. Richards
Deputy Attorney General

[2] As amended by PL 106-284, 114 Stat 870 (October 10, 2000), the Clean Water Act is now referred to as the Beaches Environmental Assessment and Coastal Health Act of 2000.

24 TERM 1929

STATE OF MICHIGAN

SUPREME COURT

John R. Hilt, and
Margaret Hilt,
Plaintiffs and Appellants,
v.
Herman H. Weber, and
Rosa F. Weber,
Defendants and Appellees.

Cal. No.
Appeal from Oceana,
In Chancery.
Hon. Joseph Barton,
Circuit Judge.

RECORD

PENNY & WORCESTER,
Cadillac, Michigan,
Attorneys for Plaintiffs and Appellants.

T. P. GDIB,
A. S. HINDS,
Shelby, Michigan,
Attorneys for Defendants and Appellees.

Mich. Brief & Record Co., 4420 Field Ave., Detroit, Mich.
WHittier 2687

3042

INDEX.

PLEADINGS, ETC.

PLAINTIFFS' TESTIMONY.

DEFENDANTS' TESTIMONY.

EXHIBITS.

(Plaintiffs')

(Defendants')

STATE OF MICHIGAN

SUPREME COURT

RECORD

AMENDED BILL OF COMPLAINT.

(Filed July 2, 1928.)

STATE OF MICHIGAN—In the Circuit Court for the County of Oceana, In Chancery.

John R. Hilt, and
Margaret Hilt,
Plaintiffs,
v.
Herman H. Weber, and
Rosa F. Weber,
Defendants.

The plaintiffs, John R. Hilt and Margaret Hilt, husband and wife, respectfully represent unto the court, as follows:

1.

That heretofore and on or about the fourteenth day of December, 1925, the plaintiffs, as tenants by the entirety, were the owners in their own right in fee

simple absolute of all those certain pieces and parcels of land situate and being in the township of Claybanks, in the county of Oceana and state of Michigan, described as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼), the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼), the north part of lot three (3) lying north of old east and west highway containing thirty-three acres more or less, lot two (2) containing forty-eight acres more or less, all being in section eight (8), township thirteen (13) north, range eighteen (18) west, of the value of twenty thousand dollars and upwards, and being such owners, the plaintiffs were willing to sell the same and all thereof and one Herman H. Weber was then willing to purchase same, and thereupon the plaintiffs and the said Herman H. Weber made and entered into certain articles of agreement in duplicate under their hands bearing date the same day and year aforesaid, and therein and thereby the plaintiffs in and by said articles of agreement did covenant and agree to sell and convey to said Herman H. Weber all and singular the said above described lands for the sum of twenty thousand dollars, payable as stated in said agreement, copy thereof is hereto attached as Exhibit A, and made a part hereof.

2.

That in and by said articles of agreement, the plaintiffs intended thereby to include the lands and premises above mentioned and described and all thereof, but by mistake of the scrivener who prepared the said agreements, the lands and premises were described therein as those certain pieces or parcels of land lying and being situate in the township of Claybanks, county of Oceana and state of Michigan and more particularly

known and described as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼), the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) the north part of lot three (3), section eight (8), containing thirty-three (33) acres, lot two (2) of section eight (8), containing forty-eight (48) acres, more or less, all of said lands being located in section eight (8), township thirteen (13) north, range eighteen (18) west, instead of the lands described in paragraph numbered (1) hereof, as was mutually intended by the plaintiffs and the said Herman H. Weber and that the parties hereto executed such contracts and interchangeably delivered same in ignorance of the said mistake and all parties hereto then believed that by the terms of said contracts, they pertained to and covered the lands and premises described in paragraph (1) herein, as aforesaid; that said articles of agreement ought to be corrected and reformed so as to conform to the intention and agreement of the parties actually made.

3.

That in consideration of the premises, the plaintiffs did in and by said agreement covenant and agree that upon the full payment of the said purchase money and the interest thereon as set forth in said contract, and upon the performance thereof by the said Herman H. Weber of the said covenants and agreements on his part to be kept and performed, the plaintiffs would by a good and sufficient deed of conveyance duly execute, acknowledge and deliver, grant and convey the said lands so intended to be conveyed, as aforesaid, with the hereditaments and appurtenances thereunto belonging unto the said Herman H. Weber, his heirs and assigns forever, in fee simple absolute, and free and clear from all incumbrances, except such as might have

occurred through the neglect or default of said vendee, agreeing thereby upon payments of all amounts due to and including December 14, 1927, to execute and deliver such deed and accept a promissory note and mortgage for the balance of the moneys thereafter in and by said contract to become due.

4.

That the said articles of agreement were executed in duplicate and were interchangeably delivered by the plaintiffs and the said Herman H. Weber, the plaintiffs receiving one of the said duplicates and the said Herman H. Weber the other thereof.

5.

That after the making, execution and delivery of the said articles of agreement and in pursuance thereof and on or about the fourteenth day of December, 1925, the said Herman H. Weber entered into the actual occupation of the said lands and premises described in paragraph (1) hereof, and ever since that time has continued and still continues to occupy and hold possession thereof.

6.

That the plaintiffs have done and performed any and all covenants and agreements incumbent upon them to perform in and by said agreement, but said Herman H. Weber has made default in the performance of his part of the covenants and agreements in the said articles of agreement required of him to be kept and performed, and has not paid the plaintiffs the instalment of such purchase money aggregating two thousand dollars, which fell due on December 14, 1927, or any part thereof except the sum of five hundred dollars advanced March 29, 1927, upon said instalment

thereafter to fall due, nor the interest thereof, although the time for the payment of such instalment has long since elapsed and that there is now due and unpaid to the plaintiffs on said agreement for principal and interest the sum of fifteen hundred forty-two and 75-100 dollars, and the further sum of eight thousand dollars and interest thereon, hereafter to become due, as provided in said agreement.

7.

That said Herman H. Weber refuses to pay the amount, so now due and owing, as aforesaid, or any part thereof; that no suit or proceedings at law has been had or taken for the recovery or collection of the amount due and owing to the plaintiffs on the said articles of agreement or any part thereof.

8.

That Rosa F. Weber is the wife of him, said Herman H. Weber, and as such claims to have some rights or interests in the said lands and premises described in paragraph (1) herein by virtue of said contract of purchase.

The plaintiffs therefore pray:

(1) That said Herman H. Weber and Rosa F. Weber, made defendants herein, show if they can why the plaintiffs are not entitled to the relief hereby prayed, their answer on oath being waived, and that they come to a just and true account as to the amount due and owing to the plaintiffs on the said contract of purchase.

(2) That said contracts or articles of agreement, a copy of which is attached hereto as Exhibit A, be corrected and reformed so as to describe the lands and

premises as those certain pieces and parcels of land situate and being in the township of Claybanks, in the county of Oceana and state of Michigan, described as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼), the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼), the north part of lot three (3), lying north of the old east and west highway containing thirty-three acres more or less, lot two (2) containing forty-eight acres more or less, all being in section eight (8), township thirteen (13) north, range eighteen (18) west, instead of the lands as described in said contracts.

(3) That said defendant, Herman H. Weber, be required to pay to the plaintiffs the amount so found to be due to him on such accounting with interest and costs of this suit forthwith or at a short day to be fixed by the court and named in such decree, the plaintiffs being ready and willing and hereby offering in case the instalment and interest due December 14, 1927, be paid, to execute and deliver such deed of conveyance as provided in said contract or as reformed, as aforesaid, in exchange for a promissory note and mortgage securing same as provided in said contract, representing the balance thereafter to become due.

(4) That in default of such payment, all the right, title and interest of said defendants and either of them in and to said lands and premises reformed as to description, as aforesaid, with the appurtenances be sold by and under the direction of this court, and that the proceeds of such sale be applied to satisfy the amount so found to be owing to the plaintiffs with interest and the costs of this suit and expenses of such sale; the surplus, if any, to be paid to the clerk of this court to apply on instalments of principal and interest as provided in said contract, not yet due.

(5) That in case of such sale the said defendants and all persons claiming or to claim by, through or under them, or any of them, or who may have come into the possession of the said premises reformed as to description, as aforesaid, or any part thereof, since the commencement of this suit, may be forever barred and foreclosed of and from all right or equity of redemption of the said above described land and premises, and that they and each and all of them yield and deliver up possession thereof to the purchaser or purchasers thereof at such sale, on production of the deed or deeds executed by the circuit court commissioner, or other person making such sale, in pursuance thereof and a certified copy of the order of this court confirming the report of such sale, after such order shall have become absolute.

(6) And in case the sale of the said land and premises reformed as to description, as aforesaid, shall fail to produce a sufficient sum to pay the whole amount so found to be due to the plaintiffs, as aforesaid, together with the costs of this suit and the expenses of such sale, that the defendant, Herman H. Weber, or such other of the defendants as shall be found to be personally liable for the same, pay to the plaintiffs the amount of such deficiency with interest, and that the plaintiffs have execution for the collection thereof.

(7) And that the plaintiffs have such further or such other relief as shall be agreeable to equity and good conscience.

Penny & Worcester,
Attorneys for Plaintiffs,
Business Address:
Cadillac, Michigan

John R. Hilt,
Margaret Hilt,
Plaintiffs.

against loss and damage by fire, by insurers, and in amount approved by the said parties of the first part, and assign the policy and certificates thereof to the said parties of the first part. And the said parties of the first part, on receiving such payment, at the time and in the manner above mentioned, shall, at their own proper cost and expense, execute and deliver to the said party of the second part, or to his assigns, an abstract of title, tax history and a good and sufficient conveyance, in fee simple, of said described lands, free and clear of and from all liens and incumbrances, except such as may have accrued thereon subsequent to the date hereof, by or through the acts or negligence of the said party of the second part or his assigns.

It is mutually agreed between said parties, that the said party of the second part shall have possession of said premises on this date and he shall keep the same in as good condition as they are at the date hereof, until the said sum shall be paid as aforesaid; and if said party of the second part shall fail to perform this contract, or any part of the same, said parties of the first part shall, immediately after such failure, have a right to declare the same void, and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as their tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom.

And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In witness whereof, the said parties have hereunto set their hands and seals the day and year above.

John R. Hilt, (L. S.)
Margaret Hilt, (L. S.)
Herman H. Weber. (L. S.)

Sealed and delivered
in the presence of:
Chas. F. Hext,
Robt. S. Mahoney.

CERTIFICATE OF COUNTY TREASURER.

No. 91.

Hart, Mich., May 31, 1928.

State of Michigan,
County of Oceana—ss.

I hereby certify that the amount secured by this mortgage is $13,000. and that I have received $65 in full for the tax thereon.

Mary Rankin,
County Treasurer.

AMENDED ANSWER AND CROSS-BILL.

(Filed Aug. 30, 1928.)

(Title of Court and Cause.)

To the Circuit Court for the County of Oceana, In Chancery:

The above named defendants, Herman H. Weber and Rosa F. Weber, respectfully show unto this honorable court in answer to the bill of complaint filed in the above entitled cause, as follows:

1st: Answering the allegations contained in the first paragraph of said bill of complaint, defendants admit the same to be true, except as stated in the second paragraph of this answer.

2nd: Answering the allegations contained in the second paragraph of said bill of complaint, defendants admit the same to be true, except that they show unto the court that the description as contained in the contract, Exhibit A, follows the form of the description of the property as contained in the deed whereby said plaintiffs obtained their title to said premises; that defendants are informed and believe that the portion of lot 3, section 8, in said township of Claybanks, lying north of the old east and west highway, does contain 33 acres of land, so that the description as contained in the first paragraph of said bill of complaint is really identical with that contained in said Exhibit A. Defendants show unto the court that they have no objection to the proposed amendment, provided the said plaintiffs can show title thereto.

3rd: Answering the allegations contained in the third paragraph of said bill of complaint, defendants admit the same to be true, but show that the deed to be delivered under the provisions of the contract, Exhibit A, is to be accompanied by an abstract of title and tax history.

4th: Defendants admit the allegations contained in the 4th paragraph of said bill of complaint.

5th: Defendants admit the allegations contained in the fifth paragraph of said bill of complaint.

6th: Answering the allegations contained in the sixth paragraph of said bill of complaint, these defend-

ants deny that the said plaintiffs have done and performed any and all covenants and agreements incumbent upon them to perform in and by said agreement and they deny that the said Herman H. Weber has made default in the performance of his part of the covenants and agreements in the said articles of agreement required of him to be kept and performed, but that admit that the said Herman H. Weber has not paid the plaintiffs the instalment of purchase money aggregating $2000 which fell due December 14, 1927, except that on March 29, 1927, the said Herman H. Weber advanced $500 to the said plaintiffs while in ignorance of the fraud and misrepresentations that had been practiced upon him, as will more fully hereinafter appear; they deny that there is now due and unpaid to the plaintiffs on said agreement for principal the sum of $1542.75, or any other sum, and they deny that there is the further sum of $8000 and interest, hereafter to become due, and they deny that there is any sum whatsoever hereafter to become due, on said agreement, all as will more fully hereinafter appear.

7th: Defendants admit that the said Herman H. Weber refuses to pay anything further on said agreement, deny that there is anything due and owing, and admit that no suit or proceedings at law have been had or taken for the recovery or collection of the amount claimed by plaintiffs to be due and owing on said agreement.

They admit that Rosa F. Weber is the wife of the said Herman H. Weber, and that as such she claims to have some rights or interests in the premises described in paragraph 1 of said bill of complaint.

Further answering the said bill of complaint, de-

fendants deny that the said plaintiffs are entitled to the relief, or any part thereof, as prayed for therein, and they pray that the said bill of complaint may be dismissed, and that defendants may be awarded their costs in this behalf sustained, to be taxed, except that defendants by this answer claim the benefit of a cross-bill, and as reasons therefor, respectfully show unto this honorable court as follows:

1st: That on, to-wit, December 14, 1925, the said Herman H. Weber purchased from the said plaintiffs the said premises described in Plaintiffs' Exhibit A, for said sum of $20,000, which would have been what the said premises were fairly worth, had they been as represented by the said plaintiffs and their agents; defendants aver, however, that the said plaintiffs and/or their agents, representing them, falsely and fraudulently represented to the said Herman H. Weber that the westerly boundary line of said lot 2, section 8, and the north part of lot 3, seotion 8, containing 33 acres (being that part of said lot 3, lying north of the old east and west highway), was at least 200 feet at the north end, and at least 167 feet at the south end, west of where defendants have since ascertained such westerly boundary line to be, and that the said plaintiffs through their agents falsely represented to these defendants that the westerly boundary line of said lots was nearly adjacent to the waters of Lake Michigan and actually pointed out to the said Herman H. Weber a line on the beach of Lake Michigan as being the westerly boundary line of said lots which was and is at least 200 feet at the north end, and at least 167 feet at the south end west of the true westerly boundary line of said lots; that the said plaintiffs thereby induced the said Herman H. Weber to purchase the said premises, although they did

not own said strip of land and had no title thereto; that said plaintiffs through their agents as aforesaid claimed that they owned and assumed to sell on said contract to the said Herman H. Weber, the said strip of land, containing about 15 acres of land, and on account of being Lake Michigan frontage, immediately adjacent to the waters of Lake Michigan, being the real and substantial value contained in the property so purchased; that the said plaintiffs through their agents as aforesaid, also made the misrepresentations contained in the 5th and 6th paragraphs of this answer and cross-bill, as hereinafter set forth.

2nd: That the said representations so made by the said plaintiffs through their agents as aforesaid, were made by them in order to induce the said Herman H. Weber to purchase the said premises and that such representations were then and there believed by the said Herman H. Weber and were relied on by him as being true; and that if the said Herman H. Weber had known the real truth about said premises, and had known that the said plaintiffs did not own the said strip, averaging at least 183½ feet wide, by 3450 feet long, or thereabouts, adjacent to the waters of Lake Michigan, he would not have purchased the said premises, would not have signed said contract, would not have paid the down payment of $7000, would not have paid $2000.20 on December 14, 1926, and would not have on March 29, 1927, paid the $1500 that he did pay; and that in fact the misrepresentations which the said plaintiffs so made through their agents as aforesaid, were the procuring cause of such sale being made to the said Herman H. Weber. Defendants show that the said plaintiffs and their said agents well knew that the said Herman H. Weber was purchasing the said premises as Lake Michigan frontage

and well knew that the value thereof lay in such frontage and that he would not have purchased the same, or have paid what he did, if he had not supposed that said plaintiffs owned said strip and that they could and did give to the said Herman H. Weber the entire and exclusive title and right to the possession of the same.

3rd: That after the purchase of said premises on said contract, and a short time prior to the 11th day of October, 1927, these defendants learned the truth about the said strip of land and then for the first time became convinced that the said plaintiffs through their agents as aforesaid had practiced said acts of fraud and deceit upon the said Herman H. Weber, and that on the 11th day of October, 1927, these defendants caused a letter to be written and sent in duplicate to each of the said plaintiffs complaining of the misrepresentations which they had so made to these defendants and asking whether it would be possible to come to an agreement as to the amount of the damages which defendants have suffered in the premises, to which letter neither of said plaintiffs have ever made any reply.

4th: That the principal value of the premises so purchased by these defendants from the said plaintiffs lies in the said strip of land so adjacent to the waters of Lake Michigan, and that the difference between the value of said premises as such value would be if the said representations had been true and the value of said premises as such value actually was, was at the time of said purchase and still is at least the sum of twelve thousand ($12,000) dollars, and defendants allege and expressly charge the truth to be that they have been damaged by such acts of fraud, deceit and

misrepresentation, at least the said sum of $12,000 and the interest thereon from December 14, 1925.

5th: That the southern boundary line of the portion of lot 3, section 8, in said township of Claybanks, which this defendant, Herman H. Weber, purchased, is the old east and west highway which runs in a northeasterly and southwesterly direction, and that by reason of the meander line being so far east of where it was represented to the said Herman H. Weber to be, the frontage on Lake Michigan that the said plaintiffs are able to give title to, is and was actually shortened by at least forty feet, thus increasing the damages to which these defendants are entitled, by at least two hundred forty ($240) dollars, at $6 per front foot, which was approximately the price at which such frontage was figured; that a portion of said shortening of frontage is where a creek, called Whisky creek, is located and that defendants' damages are still further increased by reason of losing the portion of said creek included in the frontage lost to defendants by reason of the shortening of said frontage.

6th: That after the contract, Exhibit A, dated December 14, 1925, was fully executed, and the down payment therein recited, was fully paid, and on, to-wit, January 21, 1926, the said Herman H. Weber was informed by O. E. Huston, the agent of the said plaintiffs who brought about the deal for the purchase of the premises included in said contract, Exhibit A, that the land described as follows: All parcels lying north of the east and west public highway extending up to and joining with the south lines of the Hilt and Breen properties, in section 8, in said township of Claybanks, did not belong to the said plaintiffs, and did belong to Henry A. Omness; that the said O. E. Huston had

previous to the execution of said contract, Exhibit A, pointed out a portion of said last described lands as being part and parcel of the lands to be included in the sale by said plaintiffs, as contemplated in said contract; that said land so belonging to the said Henry A. Omness was necessary to complete the purchase of the said Herman H. Weber, and that these defendants were compelled to and did purchase the said Omness lands a portion of which these defendants supposed the said Herman H. Weber had previously purchased on said contract from the said plaintiffs, and that said defendants paid to the said Henry A. Omness the sum of $31 therefor, later receiving a deed from the said Henry A. Omness and wife, Anna, which is recorded under date of February 5, 1926, in Liber 111 of Deeds, page 542.

In consideration of the premises, these defendants and cross-plaintiffs being without remedy except in a court of equity, hereby pray:

I. That the said plaintiffs may be required to make answer to all and singular the matters contained in this cross-bill, but not under oath, their answer under oath being hereby expressly waived.

II. That the said plaintiff may come to a just and true accounting of the amount of damages to which these defendants are entitled to receive, by reason of the several acts of fraud and deceit so practiced upon the said Herman H. Weber by them through their agents as aforesaid, and that this court will decree that the sum so found to be due these defendants by reason thereof, may be ordered paid to them by the said plaintiffs within a short period of time to be therein designated.

III. That the said plaintiffs may come to a just and true accounting of the amount that would be unpaid at the date of such decree on said contract, Exhibit A, if said false and fraudulent misrepresentations had not been made, and that such amount may be taken from the amount of damages to which these defendants may be found entitled, and the balance certified as a money decree in favor of these defendants and defendants have execution therefor.

IV. That the said plaintiffs may be required specifically to perform the terms and conditions of said contract by the delivery to these defendants of a good and sufficient conveyance of the said premises to these defendants, accompanied by abstract and tax history, in settlement of so much of the damages to which these defendants may be entitled, as the balance otherwise unpaid on said contract, may call for, these defendants hereby offering to accept such deed, abstract and tax history (showing good title in plaintiffs) in payment of so much of said damages and hereby offering further to make up to plaintiffs any balance, if any remaining unpaid, over and above their damages and the sum so found to be unpaid on said contract.

V. That in the event that plaintiffs do not sign such a conveyance so as to specifically perform said contract, the decree of this court may itself operate as such conveyance, provided the title to said premises is in said plaintiffs on the records in the office of the register of deeds.

VI. That these defendants may be decreed their costs in this behalf sustained to be taxed, and that they may have execution therefor.

VII. That these defendants may have such other, further or different relief in the premises as equity

may require and to this honorable court shall seem meet, and these defendants and cross-plaintiffs will ever pray, etc.

Herman H. Weber, and
Rosa F. Weber,
By A. S. Hinds,
Their Attorney.

A. S. Hinds,
(Fred P. Geib, Of Counsel),
Attorneys for Defendants.
Business Address:
Shelby, Michigan.

ANSWER TO CROSS-BILL.

(Filed July 31, 1928.)

(Title of Court and Cause.)

In answer to the cross-bill of the defendants filed in said cause, the plaintiffs say:

1.

Answering paragraph (1) of said cross-bill, they deny that they or their agents in making sale of said premises to the defendants represented to said defendant, Herman H. Weber, that the westerly boundary line of lot two (2) referred to in the bill of complaint and the north part of lot three (3) as alleged, or the west line of either thereof, was at least two hundred (200) feet at the north end, and one hundred sixty-seven (167) feet east of any line then or since ascertained as a boundary; deny that they or their agents represented or claimed that the westerly boundary line of said lots was nearly adjacent to the waters of Lake Michigan; deny that they or their agents pointed out to said

85-0818

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 85-0818

STATE OF WISCONSIN,

Plaintiff-Appellant and Respondent,

v.

THOMAS D. TRUDEAU, TRUDEAU DEVELOPMENT, INC., TRUDEAU CONSTRUCTION, INC., SUPERIOR DEVELOPMENT, INC.,

Defendants-Respondents and Petitioners.

and

THE ASHLAND COUNTY BOARD OF ADJUSTMENT, LARRY HILDEBRANDT, ASHLAND COUNTY ZONING ADMINISTRATOR,

Defendants-Respondent.

APPEAL FROM DISTRICT III OF THE COURT OF APPEALS OF WISCONSIN

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT AND RESPONDENT

BRONSON C. LA FOLLETTE
Attorney General

THOMAS L. DOSCH
Assistant Attorney General

Attorneys for Plaintiff-Appellant and Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0770

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PROJECT SITE IS PART OF THE BED OF LAKE SUPERIOR.

A. All land underlying the waters of a navigable Wisconsin lake up to the elevation of the lake's ordinary high-water mark are held in trust by the state.

As referred to previously in this brief, the complaint alleged that the Developers violated sec. 30.12, Stats., by constructing "Cluster A" on the bed of Lake Superior. That statute reads, in pertinent part:

> (1) GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> (a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or
>
> (b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

Where violations of that statute are found, sec. 30.15, Stats., authorizes appropriate injunctive relief.

Section 30.12 and chapter 30, Stats., generally speaking, codify a number of common law doctrines regarding the ownership of the beds of navigable waters. It has long been established, indeed to the point of being "too well settled to warrant any discussion" by the Wisconsin Supreme Court, that:

> The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the

> line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.

Illinois Steel Co. v. Bilot and wife, 109 Wis. 418, 425, 84 N.W. 855 (1901) (emphasis added). See also State v. McDonald Lumber Co., 18 Wis. 2d 173, 176, 118 N.W.2d 152 (1962). This is as true of the beds of the Great Lakes as it is of lesser inland waters. Ibid. An informative historical background of this public trust is found in the landmark case of Muench v. Public Service Comm., 261 Wis. 492, 53 N.W.2d 514 (1952), where the court noted:

> At an early date in its history the Wisconsin court put itself on record as favoring the trust doctrine, that the state holds the beds underlying navigable waters in trust for all of its citizens, subject only to the qualification that a riparian owner on the bank of a navigable stream has a qualified title in the stream bed to the center thereof.

261 Wis. at 501-02. Title to lake beds, however, passed to the state upon statehood. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845). Section 30.12, Stats., is a codification of the common law restriction against encroachments on publicly held lakebeds. See Hixon v. Public Service Comm., 32 Wis. 2d 608, 616, 146 N.W.2d 577 (1966).

The definition of what constitutes the ordinary high-water mark (OHWM) of a lake, which demarcates the state-owned lakebed from the upland capable of private ownership,

is similarly well-established in the law. In Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914), where the court examined the ownership of a bay area which was navigable in fact only part of each year and which contained vegetation four to five feet above the water's surface, the court observed:

> By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. Lawrence v. American W.P. Co. 144 Wis. 556, 562, 128 N.W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

156 Wis. at 272. For purposes of determining the extent of control of the public trust "it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation." Ibid.

From a factual perspective, the trial court was presented with the need to determine whether the inundated Marina Point Condominiums site is a part of Lake Superior, or whether it is some sort of discrete non-navigable water body. The legal consequences of either of these factual

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

LEON S. COHAN
Deputy Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48926

June 5, 1968

Mr. Robert M. Hea
808 Maple Street
Essexville, Michigan 48732

Dear Mr. Hea:

In response to your recent letter concerning the article appearing in the Bay City Times entitled "Water Is Public Trust" the following is indicated.

In Michigan, natural waters are divided into two classes--the Great Lakes and inland waters. Bauman vs. Barendregt, 251 Mich. 67.

With respect to the Great Lakes, a riparian owner (one who owns land bordering the lake), owns the land between the meander line and the water, has exclusive use of the bank and shore, and may erect bathing houses and structures thereon for his business or pleasure. Hilt vs. Weber, 252 Mich. 198.

On inland lakes and streams, the riparian owns the lake or stream bottom land out to the center of the lake or stream, but does not own the water flowing over the bottom lands or the wildlife therein. While riparian owners own the fee to the bed of a navigable lake, their ownership is subordinate to the right of the public to the free and unrestricted use of the waters for navigation and other uses inherently belonging to the people. Morgan vs. Kloss, 244 Mich. 192. Thus, a riparian owner may construct a dock or pier for the purpose of facilitating his use and enjoyment of the waters of the lake (Blain vs. Craigie, 294 Mich. 545), but may not erect a retaining wall some distance from shore and fill in the intervening submerged land, thereby interfering with the right of other riparian owners to use the entire surface of the lake. Burt vs. Munger, 314 Mich. 659.

In summary, persons holding property on navigable lakes and streams may not unreasonably interfere with the use of the entire surface of the lake or stream by other riparian owners, and the same principle is applicable to the general public where the public has access to the body of water by way of connecting streams or at other points of public access.

Yours very truly,

FRANK J. KELLEY
Attorney General

JACK W. SCULLY

ARENAC COUNTY PROSECUTING ATTORNEY

105 NORTH GROVE
STANDISH, MICHIGAN 48658
TELEPHONE 517/846-4597

September 25, 1987

Mr. James Balten
County Coordinator
The Courthouse
Standish, Michigan 48658

In re: Shoreline Boundary, Promenade Beaches, Ordinance

Dear Mr. Balten:

You have requested that I appear before the board to discuss the above. Commissioner Davis has spoken to me concerning the same subjects. In my opinion the questions posed are matters which are civil in nature. In lieu of appearing before the board I make the comments below:

The law of the State of Michigan is that riparian owners of land, to-wit: owners of property along the Great Lakes, own to the waters edge wherever that may be, today or in the future. The State of Michigan holds submerged lands in trust. Meander lines designated by initial government and present surveyors are simply lines of convenience and have no bearing upon ownership. A riparian owner owns to the water.

The above being the case, a riparian owner may prohibit non-owners from the use of a strip of land between the upland and the waters edge. There are a few street easements, rights-of-way, and lanes throughout the county which were dedicated to the public and which extend to the waters edge. The public has a right to utilize the same to the waters edge for any reasonable purpose but would not be able to pass or occupy any beach area adjacent to same.

There does exist at the Wallace and Orr Park and Glenwood Beach Subdivisions a further designation of a beach described as a promenade beach. Commissioner Davis has suggested to me that an ordinance be adopted by the County of Arenac to insure the public's right to utilize such promenade beaches, to prevent the riparian owners thereat from maintaining docks and other structures, and which would allow police agencies to issue citations to those in violation of such ordinance. In my opinion such an ordinance is unwarranted and in fact would not be proper for a number of reasons. A view of the original plat for the two mentioned subdivisions indicate that the streets and alleys designated upon same were dedicated to the use of the public. Said plats make no mention of any kind as to whether the promenade beach is dedicated to the public. This being the case, I do not believe the county should adopt any ordinance regulating the use of the same when the county does not own such beach in any fashion. The beach at the mentioned location is owned by the water front owners. Such ownership is subject to whatever rights individuals may have because of the designation on the plat "promenade beach". Such rights have never been completely defined

although there have been a few court actions over the years by individuals seeking to have such rights determined. Such court actions are civil in action.

I am not aware of the circumstance of every county, but it would be my belief that few if any counties attempt to regulate by ordinance activities upon privately owned land. Certainly there would be ordinances covering lands where the fee is owned directly by the county or a township such as a county or township park. Adopting an ordinance, valid or not, could cause further litigation and uncertainty from many directions, including that of an individual seeking damages for failure to enforce the same.

If the County of Arenac desires to provide unfettered and unencumbered access to the waters of Lake Huron, the clearest approach would be to purchase such land and develop a county park or convince the State of Michigan to do the same. To attempt to regulate privately owned lands, in my opinion, is an activity the county should not undertake.

Sincerely yours,

JWS

Jack W. Scully
Arenac County Prosecutor

JWS:dls